

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
December 16, 2008 Session

**STATE OF TENNESSEE v. JESSIE RUSSELL PIETY**

**Direct Appeal from the Criminal Court for Knox County  
No. 82668     Mary Beth Leibowitz, Judge**

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**No. E2008-00263-CCA-R3-CD - Filed September 22, 2009**

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A Knox County Criminal Court jury convicted the appellant, Jessie Russell Piety, of aggravated rape and aggravated assault, and the appellant received an effective fifteen-year sentence. On appeal, the appellant contends that (1) the trial court improperly denied his motion for a new trial because the State suppressed photographs of the victim that were favorable to the defense; (2) the trial court erred by failing to declare a mistrial when the victim testified that the appellant had been jailed previously for aggressive behavior; (3) the victim improperly testified about the appellant's drug use; (4) the trial court should have given the jury more information as to why one count of aggravated assault was dismissed after the State's case-in-chief; (5) the victim improperly gave hearsay testimony; and (6) he is entitled to a new trial because his brother was required to testify wearing jail attire and handcuffs. Upon review, we conclude that the State's suppression of favorable photographs is reversible error. Therefore, the appellant's conviction for aggravated rape is reversed, and the case is remanded to the trial court for a new trial as to that offense. The appellant's conviction for aggravated assault is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part, Reversed in Part, and the Case is Remanded.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which THOMAS T. WOODALL, J., joined. JOSEPH M. TIPTON, P.J., not participating.

Donald A. Bosch and Ann C. Short-Bowers (on appeal) and Steve Sams (at trial), Knoxville, Tennessee, for the appellant, Jessie Russell Piety.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The appellant does not contest the sufficiency of the evidence. At trial, the then twenty-three-year-old victim testified that in May 2005, she was engaged to the appellant. They lived in the victim's three-bedroom townhouse apartment in Knoxville with the victim's three young children. The appellant's brother, Luke Piety, often slept on the living room couch. Augustina "Pia" Lopez, the victim's friend, was visiting from Texas, was "seeing" Luke, and slept on the couch with him. On May 6, 2005, the victim did not go to her job at Gerldwin Millworks because the appellant did not like for her to work. That afternoon, she and the appellant went to eat at a Wendy's restaurant, and the appellant cursed at her when she did not want him to pay for her food. The victim was embarrassed and walked outside to her car, and she was followed by the appellant. The victim got into her car and locked the doors, and the appellant punched the window and kicked the car. The victim drove away, leaving the appellant at the restaurant. She returned to her apartment and began packing her and her children's belongings, but the appellant returned before she was able to leave and told her that she was not going anywhere. That night, the appellant tried to kiss the victim in the living room. When the victim refused to kiss him, he began choking her. She attempted to push him off of her, and he threw her off the couch, causing her to hit a table. The appellant had a gun, pointed it at the victim's temple, and threatened to kill her. He hit the victim on her face with his hands and threw her against a table and a wall. A few hours after the living room incident, the appellant hit the victim in the kitchen. At some point, the appellant went upstairs to bed. The victim also went to bed and slept in the same bed with the appellant.

The victim testified that on the morning of May 7, she woke up with her pants and underwear pulled down and the appellant trying to have sexual intercourse with her. The victim protested, but the appellant hit and choked her and penetrated her vaginally. During the rape, the victim's mother and younger sister arrived at the apartment. The victim's sister came to the bedroom door, which was closed, and said something about some shoes. The victim opened the bedroom door and ran out of the room, down the stairs, and out the front door. The victim's mother saw the victim's face and telephoned 911. While the victim was speaking with the police over the telephone, the appellant came outside. The victim told the 911 dispatcher that the appellant had a gun and was going to shoot her mother. The appellant dropped the gun but picked it up, ran inside the apartment, and ran out the back door with his brother. The appellant fired the gun toward the front of the victim's apartment building where she was standing with her mother and sister.

On cross-examination, the victim testified that during the fight in the living room on the night of May 6, the appellant did not hit her with the gun but pointed it at her temple. She said she did not leave because she did not have a telephone or a car. When the defense reminded her that she had a car at Wendy's, she said, "Oh, that's right. It was messed up by then." When the defense asked again why she did not leave, the victim said, "Because it was my home. I don't know, I just -- really I don't know why I didn't leave." The victim said that when her mother saw her face on the morning of May 7, her mother was "shocked" and telephoned 911. The victim did not tell her mother or the 911 dispatcher that she had been raped.

Brenda Armenta, the victim's sister, testified that on the morning of May 7, 2005, Pia Lopez let her into the victim's apartment. Armenta went upstairs to the victim's bedroom door. She heard noises, thought the appellant and the victim were having sex, and announced through the door that she was there to get her prom shoes. The victim ran out of the bedroom, down the stairs, and outside to where their mother was standing.

Maria Sheffield, the victim's mother, testified that on the morning of May 7, she was standing at the front door of the apartment when the victim ran outside. She saw the victim's injuries and telephoned 911. Brenda Armenta came outside while the victim was talking with the police on the telephone. The appellant also came outside and pointed a gun at the three women. The appellant dropped the gun, picked it up, and ran inside the apartment. He and his brother then ran out the back door. The appellant fired the gun between two apartment buildings and toward the front of the victim's apartment building where the women were standing.

Knoxville Police Department Officer Rick Eastridge testified that he was dispatched to the victim's apartment on May 7, 2005. The victim was very upset, crying, and almost hysterical. The victim told him that her boyfriend had assaulted and raped her. Officer Eastridge checked the area but did not find the appellant or his brother.

Angela Shaffer, a nurse at the sexual assault crisis center, testified that on May 7, 2005, she examined the victim and photographed her injuries. The left side of the victim's face was swollen and bruised; she had abrasions and small broken blood vessels around her neck, indicating strangulation; her left eye was turning black; she had red marks on her left arm and bruises on her right arm; her stomach was tender; she had scrapes on her upper back; her right labia was swollen and tender; and she had abrasions and redness on her buttocks. Shaffer stated that the victim told her what had happened and that the victim's injuries were consistent with the victim's story.

The appellant testified that on the night of May 6, 2005, he and his brother wanted to go to a nightclub but that the victim did not want him to go. As the appellant was walking down the stairs, the victim pushed him from behind. She also argued with him and hit him. The appellant "smacked" the victim, but she kept fighting him. The appellant grabbed the victim's wrists, and the victim "flew across the room and landed on the coffee table." They continued to fight but later apologized to each other and drank liquor. Later that night, they had consensual anal and vaginal sex. They also had consensual sex the next morning. The victim's sister, Brenda Armenta, and the victim's mother, Maria Sheffield, arrived at the apartment, and the appellant heard the victim downstairs arguing with her mother. The appellant went downstairs, and Sheffield began yelling at him. The appellant got his gun and pointed it at her. Armenta knocked the gun out of the appellant's hand, and the women hit the appellant and tried to get the gun. Armenta picked up the gun, but the appellant wrestled it away from her. He and his brother ran out the back door of the apartment and through the parking lot. The appellant saw some men he had been "having problems with" and fired the gun into the air. He said he did not rape the victim or point a gun at her. On cross-examination, the appellant acknowledged that he choked the victim and inflicted her injuries.

Luke Piety, the appellant's brother, testified that the victim and the appellant loved each other but fought often. On the night of May 6, 2005, the appellant and the victim got into a fight because the victim did not want the appellant to go to a nightclub. The victim and the appellant hit each other. The victim also threw objects at the appellant and scratched and pushed him. The next morning, Luke Piety was sleeping on the living room couch and saw the appellant come downstairs. The victim's mother came into the apartment and hit the appellant. The appellant went to a closet, got a gun, and pointed it at the victim's mother. The victim's sister got the gun, but the appellant wrestled it away from her. The appellant yelled, "Let's go" to his brother, and they ran out the back door. The appellant fired one shot into the air. No other people were around them when the appellant fired the gun. On cross-examination, Luke Piety testified that he saw the appellant hit and choke the victim on the night of May 6. The jury convicted the appellant of aggravated rape and aggravated assault of the victim on May 7, 2005.

## **II. Analysis**

### **A. Suppressed Photographs**

The appellant contends that the trial court improperly denied his motion for a new trial because the State suppressed photographs taken during the victim's physical examination that were favorable and material to the defense. The State argues that the trial court properly denied the motion. We agree with the defense and reverse the appellant's conviction for aggravated rape.

Nurse Angela Shaffer testified that on May 7, 2005, she conducted a pelvic examination on the victim at the sexual assault crisis center and took photographs. She described the victim's various injuries, including that the victim's "right labia was swollen and tender." She also stated that the victim's buttocks "had abrasions and redness two by two inches. And it was tender and swollen." During Shaffer's testimony, the State introduced into evidence a female body diagram Shaffer had filled out showing the victim's injuries. During the victim's testimony, the State also introduced into evidence photographs of her injuries. However, as noted by the appellant, none of the photographs showed the victim's "intimate parts."

In the appellant's amended motion for new trial, he claimed that the State withheld exculpatory and impeaching photographs of the victim. In support of his claim, the appellant filed affidavits from one of his attorneys retained on appeal; his trial attorney; and Dr. Kent G. Miller, a Georgia physician specializing in the practice of obstetrics and gynecology. According to appellate counsel's affidavit, she reviewed the discovery materials contained in trial counsel's file and the prosecution's file. Appellate counsel discovered that fifteen photographs in the State's file, including two photographs of the victim's vulva and buttocks, had not been provided to the defense during pretrial discovery. According to trial counsel's affidavit, he filed a pretrial motion for discovery in the case and received what the State told him was "all of the discovery materials in existence." However, trial counsel never received photographs of the victim's vulva or buttocks. In Dr. Miller's affidavit, he stated that he reviewed Angela Shaffer's trial testimony, the victim's testimony, and the victim's medical records from the sexual assault crisis center. He also reviewed

photographs of the victim's vulva and buttocks taken on May 7. Dr. Miller noted that redness and abrasions to a person's buttocks could occur during consensual vaginal or anal intercourse. Dr. Miller then stated as follows:

4. I have been provided photographs of [the victim's] vulva and buttocks that were represented to me to have been taken the same day of the reported rape. . . . A forcible rape, under no circumstances, could be diagnosed based on the photographs and physical findings in this case.

5. The condition of the vulva and buttocks shown in the photographs is absolutely nondiagnostic of a forcible rape. Additionally, the condition of the vulva and buttocks shown in the photographs is rather clinically unremarkable and certainly not diagnostic for any significant trauma that would normally be visualized with a rape case.

6. In my opinion, not only are the photographs inadequate to provide a diagnostic basis to conclude that a forcible rape occurred, but the absence of any significant trauma in the photographs supports the medical conclusion that a forcible rape most likely did not occur.

In its written response to the appellant's motion for new trial, the State argued that the photographs were inculpatory. The State also attached to its response the affidavits of Dr. Darinka Mileusnic and certified Sexual Assault Nurse Examiners Ginger W. Evans and Sally M. Helton, disagreeing with Dr. Miller's conclusion that a forcible rape could not be diagnosed from the newly discovered photographs and physical findings.

At the appellant's motion for new trial hearing, appellate counsel characterized the photographs as "exculpatory and very important" and argued that the State's failure to turn them over prior to trial violated Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). The State acknowledged that "a discovery violation of some sort occurred." However, the State asserted that no Brady violation occurred because the photographs were not favorable to the defense. Specifically, the State argued that the photographs were inculpatory because they showed that the victim's vulva was swollen and that her buttocks were red. The State also requested a hearing in order to cross-examine Dr. Miller. In a written order, the trial court ruled that the photographs were "not necessarily favorable to the defendant nor are they dispositive in light of the fact that there is not a reasonable probability that had the evidence been disclosed the result of the proceedings would have been different." The court concluded that the jury "clear[ly] . . . accredited the testimony of [the victim]" and held that the appellant was not entitled to relief.

In Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97, the United States Supreme Court held that the State has a constitutional duty to furnish the defendant with exculpatory evidence pertaining to the

defendant's guilt or innocence or to the potential punishment faced by the defendant. Specifically, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. The State's duty to disclose exculpatory evidence extends to evidence which may be used by the accused for impeachment purposes. Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 766 (1972).

In order to prove that a Brady violation exists, a defendant must show that (1) he requested the information (unless the evidence is obviously exculpatory, in which case the State is obligated to release such evidence regardless of whether or not it was requested); (2) the State suppressed the information; (3) the information was favorable to the defendant; and (4) the information was material. State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). The appellant bears the burden of proving a Brady violation by a preponderance of the evidence. Id.

The parties do not dispute that the defense requested the information and that the State failed to turn over the evidence. Therefore, we turn to whether the information is favorable to the appellant. The appellant claims that the evidence is favorable because the photographs show a lack of trauma to the victim's vulva and buttocks and would have enabled the defense to conduct further investigation. Evidence is favorable if it "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Johnson v. State, 38 S.W.3d 52, 56-57 (Tenn. 2001) (quoting Commonwealth v. Ellison, 379 N.E.2d 560, 571 (Mass. 1978)). In this case, the appellant claimed that his sexual activity with the victim was consensual. However, Nurse Angela Shaffer testified at trial that the victim's right labia was swollen and tender and that she had abrasions and redness on her buttocks, supporting the victim's claim that the appellant raped her. We have reviewed the photographs in question and the female body diagram filled out by Angela Shaffer. The photograph of the victim's vaginal area shows redness, particularly on the left side as Shaffer testified. Furthermore, the area of redness on the left side corresponds exactly to the area Shaffer noted on the diagram. However, we are unable to discern any swelling from the photograph. The photograph of the victim's buttocks shows areas of redness but no abrasions. Therefore, we agree that the photographs are favorable to the appellant.

Regarding the fourth requirement, materiality, our supreme court has explained, "Evidence is deemed to be material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Johnson, 38 S.W.3d at 58 (quoting Edgin, 902 S.W.2d at 390). The United States Supreme Court explained that the

touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of

confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”

Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995) (quoting United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381 (1985)). In other words, a defendant must show that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles, 514 U.S. at 435, 115 S. Ct. at 1566. Turning to the present case, the only evidence of rape was the victim’s testimony and Angela Shaffer’s testimony about the results of the victim’s physical exam. Given that the results of the exam were crucial to the State’s case and that the photographs failed to show some of the injuries Shaffer described, there is a reasonable probability that the photographs would have affected the outcome of the trial. Therefore, the appellant’s conviction for aggravated rape is reversed, and the case is remanded to the trial court for a new trial as to that offense.

### B. Mistrial

Next, the appellant contends that the trial court erred by failing to declare a mistrial when the victim testified that he had been jailed previously for aggressive behavior. The State argues that the trial court properly refused to declare a mistrial. We agree with the State.

During the victim’s direct testimony, she described her altercation with the appellant at Wendy’s and stated that she drove home, leaving the appellant at the restaurant. The State asked her if the appellant returned to the apartment, and the victim responded that the appellant returned as she was packing her and her children’s belongings. She said the appellant told her, “[Y]ou’re not going anywhere.” She then testified as follows:

And so, I was like, okay. I’m going to play it, you know. Okay. I’m going to -- I said, “You need to calm down because I don’t like the way you’re acting aggressive.” I mean when we lived in Sevierville he did go to jail for --

The appellant’s attorney interrupted the victim by saying, “Your Honor.” The trial court told the jury to disregard the victim’s statement, asked the attorneys to approach the bench, and told them, “You might have a problem here.” Defense counsel agreed and said he believed the victim’s statement was very prejudicial. The trial court stated, “I’ve already instructed the jury to disregard it, but if she outs again, you’re going to get . . . a mistrial on your hands.” The bench conference concluded, the trial court informed the jury again to disregard the statement, and the victim’s testimony resumed. After the victim’s testimony, defense counsel requested a mistrial. The trial court denied the motion, noting that it had instructed the jury to disregard the victim’s comment.

A mistrial should be declared in criminal cases only in the event that a manifest necessity requires such action. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). In other

words, a mistrial is an appropriate remedy when a trial cannot continue or a miscarriage of justice would result if it did. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). This court has stated:

“When determining whether a mistrial is necessary after a witness had injected improper testimony, this court has often considered: (1) whether the improper testimony resulted from questioning by the State, rather than having been a gratuitous declaration; (2) the relative strength or weakness of the State’s proof; and (3) whether the trial court promptly gave a curative instruction.”

State v. Bennie Nelson Thomas, Jr., No. W2004-00498-CCA-R3-CD, 2004 WL 2439405, at \*5 (Tenn. Crim. App. at Jackson, Nov. 1, 2004) (quoting State v. Paul Hayes, No. W2001-02637-CCA-R3-CD, 2002 WL 31746693, at \*4 (Tenn. Crim. App. at Jackson, Dec. 6, 2002)). The decision to grant a mistrial lies within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion absent clear abuse appearing on the face of the record. See State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998). Moreover, the burden of establishing the necessity for mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

Initially, we note that the issue of a mistrial was raised by the trial court, not the appellant. The appellant did not request a mistrial until after the victim’s testimony had concluded. In any event, although the appellant claims that the State should have known the victim’s “rambling” could result in her interjecting highly prejudicial and improper testimony, nothing indicates the State was aware the victim was going to blurt out that the appellant had been jailed previously. Furthermore, the victim did not state that the appellant had been jailed for aggressive behavior; the defense interrupted her before she was able to tell the jury why he had been jailed. Finally, the trial court instructed the jury twice that it was to disregard the victim’s comment. Generally, we presume that a jury has followed the trial court’s instructions. See State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Therefore, we conclude that the appellant is not entitled to relief.

### C. Drug Use Testimony

The appellant argues that the victim improperly testified about his drug use. He acknowledges that he did not object to the victim’s testimony at trial but contends that he is entitled to a new trial because the victim’s testimony rises to the level of plain error. The State claims that the appellant is not entitled to plain error relief. We agree with the State.

During the victim’s direct testimony, she stated that on May 6, 2005, the appellant’s friend came to her apartment and gave the appellant a tattoo. The appellant’s friend worked on the tattoo during the day and into the evening. The victim said that on the night of May 6, after the appellant’s friend had left the apartment and her fights with the appellant had ended, the appellant went upstairs to bed. The following exchange then occurred:



Q Okay. Did anything happen between then and you going to bed?

A No, because he was--he was passed out by then.

Q Why was he passed out, if you know?

A Because he was on pills. Where he was getting the tattoos done, he was taking lots of pills.

The appellant did not object to the victim's testimony. During his direct testimony, defense counsel asked the appellant if he was in pain while he received the tattoo. The appellant said yes, and counsel asked if he took anything for the pain. The appellant testified that he took "Xanaxes and Hydros," painkillers that made him sleepy. On cross-examination, the appellant denied consuming the pills with alcohol or consuming Percocet and Clonazepam. The appellant contends that it was plain error for the victim to testify that he consumed pills.

Tennessee Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts [generally] is not admissible to prove the character of a person in order to show action in conformity with the character trait." The appellant's failure to make a contemporaneous objection to the victim's testimony waives the issue on appeal. See Tenn. R. App. P. 36(a). However, Tennessee Rule of Appellate Procedure 36(b) (2009) provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time." See also Tenn. R. Evid. 103(d). We may only consider an issue as plain error when all five of the following factors are met:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached; (c)
- a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and (e)
- consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); see also State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the Adkisson test for determining plain error). Furthermore, the ""plain error" must be of such a great magnitude that it probably changed the outcome of the trial."" Adkisson, 899 S.W.2d at 642 (quoting United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988)).

In this case, the victim testified that the appellant consumed pills; she did not say he took illegal drugs or improperly took prescription drugs. It was the appellant who informed the jury that he took Xanax and "Hydros." In any event, even if the victim's testimony was improper, the appellant has not explained how it constitutes plain error, and we do not believe consideration of the alleged error is "necessary to do substantial justice." As this court has explained, "rarely will plain

error review extend to an evidentiary issue.” State v. Ricky E. Scoville, No. M2006-01684-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 711, at \*5 (Nashville, Sept. 11, 2007). The appellant is not entitled to relief.

#### D. Dismissed Count

The appellant contends that the trial court should have declared a mistrial or given the jury an adequate instruction when the court dismissed count one, aggravated assault of the victim on May 6, after the State’s case-in-chief. The State contends that the trial court properly instructed the jury about the dismissed charge. We agree with the State.

The appellant originally was indicted for count one, aggravated assault of the victim by using or displaying a deadly weapon on May 6, 2005; count two, aggravated assault of the victim by using or displaying a deadly weapon on May 7, 2005; count three, aggravated rape causing bodily injury to the victim on May 7, 2005; and count four, aggravated assault of the victim by using or displaying a deadly weapon on May 7, 2005. Count four was later dismissed because it was duplicative of count two.

After the State’s case-in-chief, the trial court granted the appellant’s motion for judgment of acquittal as to count one because the victim’s claim that the appellant assaulted her while using or displaying a deadly weapon on the night of May 6 did not agree with the proof. The court explained that it was going to tell the jury count one had been dismissed “on a technicality.” The defense did not object. However, prior to the State’s closing argument, defense counsel asked the court, “Would it be clearer to explain that it was the count relating to the events [on] Friday night because that was-- was the 6th, because we have two separate assaults, Friday and Saturday?” The trial court stated that it did not want to “explain anything because I’m afraid to point them in any direction . . . of consideration.” The court noted that the jurors could “read the indictment for themselves and see what they’re talking about.” Defense counsel said, “Okay. That’s fine,” and the trial court instructed the jury as follows:

Ladies and gentlemen of the jury, before we begin the closing arguments I need to tell you that on my own I have removed one of the counts of the indictment for your consideration due to a technical reason. Therefore, you will be considering one count of aggravated assault and one count of aggravated rape and their lesser-included offenses. And all this will be within your jury charge, and you will have a copy of the indictment as you are to consider it with you in the jury room so--to make that clear to you. There will be two separate charges that you’re looking at in these cases.

Initially, we note that the appellant neither objected to the trial court’s instruction nor requested a mistrial. Therefore, the issue has been waived. See Tenn. R. App. P. 36(a). Regarding plain error, the appellant has failed to show that a clear and unequivocal rule of law was breached

or that a substantial right of the appellant was adversely affected. Therefore, plain error relief is not warranted. See Tenn. R. App. P. 36(b) (2009).

#### E. Hearsay Testimony

The appellant argues that the trial court erred by refusing to strike hearsay testimony given by the victim or by failing to give the jury a curative instruction. The State argues that the testimony at issue was not hearsay and that, in any event, it did not affect the outcome of the case. We conclude that the appellant is not entitled to relief.

The victim testified on redirect examination that after the appellant and his brother fled the apartment on the morning of May 7, Luke Piety “tried to come back and apologize for his brother.” The State asked the victim when the apology occurred, and the defense objected to the victim’s testifying about anything Luke Piety said to her. The trial court said, “Well, . . . I don’t think . . . she’s testified as to what he said to her.” The victim’s testimony resumed, and she stated that the apology occurred a few days after the crimes.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). “In determining whether a statement is hearsay, it is often necessary to determine the party’s purpose for introducing the statement into evidence.” State v. Bryan Christopher Hester, No. M2003-00503-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 436, at \*33 (Nashville, May 12, 2004) (citing Neil P. Cohen et al., Tennessee Law of Evidence § 8.01[8] (4th ed. 2000)). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802.

In the present case, it is unclear from the victim’s testimony whether Luke Piety took it upon himself to apologize for the appellant or whether the appellant asked his brother to apologize on his behalf. Regardless, the victim’s comment about the apology meets the definition of hearsay, and we believe the purpose of her testimony was to provide evidence that the appellant was guilty of the crimes. Moreover, the testimony was not admissible under any hearsay exception. Nevertheless, we believe the victim’s comment was harmless. The appellant readily admitted that he hit and choked the victim on May 6 and that he pointed a gun at her mother on May 7. Therefore, the fact that Luke Piety may have tried to apologize for the appellant was not particularly prejudicial, and we do not believe the testimony more probably than not affected the result of the trial. See Tenn. R. App. P. 36(b).

#### F. Jail Attire

Finally, the appellant contends that he is entitled to plain error relief because his brother was required to testify while wearing jail attire and handcuffs. The State contends that the appellant is not entitled to relief. We agree with the State.

After the State's case-in-chief, the trial court informed the parties that Luke Piety, who was going to testify for the appellant, had been "brought up . . . in shackles." The trial court stated that "he doesn't have [the] right to get dressed" and inquired about his alleged crimes. Defense counsel stated that Luke Piety had been charged with "a couple of ag assaults and a burglary." The court recommended that he be allowed to testify unshackled but that he wear handcuffs "in an abundance of safety." The State agreed, and the appellant made no objection.

In Estelle v. Williams, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693 (1976), the United States Supreme Court stated that forcing a defendant to stand trial while wearing prison clothes is a violation of due process because "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." "However, this court has declined to conclude that a defense witness appearing in prison clothes, without more, amounts to prejudice." State v. Courtney Partin, No. E2004-02998-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 262, at \*60 (Knoxville, Oct. 25, 2005), vacated and remanded on other grounds, 549 U.S. 1196 (Feb. 20, 2007). Therefore, Luke Piety's having to testify while wearing prison clothes and handcuffs does not warrant plain error relief. See Tenn. R. App. P. 36(b).

### **III. Conclusion**

We conclude that the appellant's conviction for aggravated rape must be reversed and the case remanded for a new trial. The appellant's conviction for aggravated assault is affirmed.

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NORMA McGEE OGLE, JUDGE